Members of the jury, now that you have heard all the evidence and the arguments of the attorneys, it is my duty to instruct you on the law which applies to this case. A copy of these instructions will be available in the jury room for you to consult if you find it necessary.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. You must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. You must not read into these instructions or into anything the court may have said or done any suggestion as to what verdict you should return—that is a matter entirely up to you.

The evidence from which you are to decide what the facts are consists of:

(1) the sworn testimony of any witness;

(2) the exhibits which have been received into evidence; and

(3) any facts to which the lawyers have agreed or stipulated.

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

(1) Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

(2) Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

(3) Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what the witness personally saw or heard or did. For example, the witness testifies, "I saw Joe break the glass." Circumstantial evidence is proof of one or more facts from which you could find another fact. For example, the witness testifies, "I saw Joe holding the glass before I left the room. No one else was in the room. When I returned, the broken glass was lying at Joe's feet." You could find that Joe had broken the glass in either example. You must consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

(1) the opportunity and ability of the witness to see or hear or know the things testified to;

(2) the witness' memory;

(3) the witness' manner while testifying;

(4) the witness' interest in the outcome of the case and any bias or prejudice;

(5) whether other evidence contradicted the witness' testimony;

(6) the reasonableness of the witness' testimony in light of all the evidence; and

(7) any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify.

If a party fails to appear and testify as to material facts within his knowledge, you may draw an inference against that party that his failure was because his testimony would not have been favorable to his position in the litigation.

You have heard testimony from persons who, because of education or experience, are permitted to state opinions and the reasons for those opinions.

Opinion testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness' education and experience, the reasons given for the opinion, and all the other evidence in the case.

Certain charts and summaries have been received into evidence to illustrate information brought out in the trial. Charts and summaries are only as good as the underlying evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.

You should decide the case as to each defendant separately. Unless otherwise stated, the instructions apply to all parties.

When a party has the burden of proof on any claim or affirmative defense by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim or affirmative defense is more probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it.

On any claim, if you find that each of the elements on which the plaintiff has the burden of proof has been proved, your verdict should be for the plaintiff on that claim, unless you also find that a defendant has proved an affirmative defense, in which event your verdict should be for that defendant on that claim.

All parties are equal before the law and a corporation is entitled to the same fair and conscientious consideration by you as any party.

Under the law, a corporation is considered to be a person. It can only act through its employees, agents, directors, or officers. Therefore, a corporation is responsible for the acts of its employees, agents, directors, and officers performed within the scope of authority.

Any act or omission of an agent within the scope of authority is the act or omission of the principal.

On the plaintiff's churning claim, the plaintiff has the burden of proving each of the following elements by a preponderance of the evidence:

1. the trading in the plaintiff's brokerage account was excessive in light of the plaintiff's investment objectives;

2. the defendants exercised control over the trading in the account;

3. the defendants acted with intent to defraud or with reckless disregard of the plaintiff's investment objectives;

4. the defendants used or caused the use of an instrumentality of interstate commerce including mail or telephone in connection with the trading in the plaintiff's account; and

5. the defendants' conduct caused damage to the plaintiff.

If you find that each of the elements on which the plaintiff has the burden of proof has been proved, your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed to prove any of these elements, your verdict should be for the defendants.

A broker exercises control over trading in an account when the client has not authorized the broker to trade and the broker trades or the client, without exercising independent judgment, routinely follows the broker's recommendations.

Intent to defraud is an intent to deceive or cheat.

Reckless means highly unreasonable conduct that is an extreme departure from ordinary care.

The defendants contend that the plaintiff waived the right to complain of the defendants' conduct.

The defendants have the burden of proving by a preponderance of the evidence that, at the time, the plaintiff knew the plaintiff had a right to complain of defendants' conduct and voluntarily or intentionally gave up that right.

If you find that each of the elements on which the plaintiff has the burden of proof has been proved, your verdict should be for the plaintiff, unless you also find that the defendants have proved this affirmative defense, in which event your verdict should be for the defendants.

The defendants contend the plaintiff is barred or estopped from complaining of the defendants' conduct. Defendants have the burden of proving each of the following elements by a preponderance of the evidence:

1. the plaintiff knew that defendants were aggressively trading stocks for plaintiff's account and were charging commissions for the trades;

2. the defendants did not know the plaintiff had objections to the trading activity in the account;

3. the defendants had a right to believe the plaintiff's omissions meant that he had no complaints about the trading activity in his account; and

4. the defendants relied upon the plaintiff's omissions.

If you find that each of the elements on which the plaintiff has the burden of proof has been proved, your verdict should be for the plaintiff, unless you also find that the defendants have proved this affirmative defense, in which event your verdict should be for the defendants.

The defendants contend the plaintiff ratified the defendants' conduct. The defendants have the burden of proving, by a preponderance of the evidence, that the plaintiff communicated to the defendants, by words or actions, that the plaintiff accepted and approved of the conduct.

If you find that each of the elements on which the plaintiff has the burden of proof has been proved, your verdict should be for the plaintiff, unless you also find that the defendants have proved this affirmative defense, in which event your verdict should be for the defendants.

It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered.

If you find for the plaintiff on any of plaintiff's claims, you must determine the plaintiff's damages. The plaintiff has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money which will reasonably and fairly compensate the plaintiff for any injury you find was caused by the defendants.

In determining the measure of damages on the claim of excessive trading or churning, you should consider the following:

- The excessive charges (commissions, markups, markdowns, interest) made by the defendants;

- The trading losses suffered by the plaintiff.

The plaintiff has the burden of proving damages by a preponderance of the evidence, and it is for you to determine what damages, if any, have been proved.

Your award must be based upon evidence and not upon speculation, guesswork or conjecture.

Plaintiff claims that there was no written or oral contract concerning the amount he would be charged for the services rendered by the defendants. If you find that the parties made a contract, either in writing or orally, concerning the amount to be charged for defendants' services (including commissions, markups, markdowns, postage and service fees, and interest), then the parties are bound by that agreement.

Contracts may be written or oral. Oral contracts are just as valid as written contracts.

Both an offer and an acceptance are required to create a contract. To prove that there was a contract or agreement on the amount of the commissions, markups, markdowns, postage, and services fees, defendant must prove both of the following:

1. That defendant Gunn Allen communicated the price that it intended to charge for each of these items to plaintiff Royal Yates, and

2. That plaintiff Royal Yates agreed to pay that price.

If you find that the defendant GunnAllen has not proven that there was a contract or agreement to pay a specific price for the services provided by defendant, then defendant GunnAllen is entitled to charge, and the plaintiff Royal Yates is obligated to pay, the reasonable value of the services rendered.

If you find that the plaintiff has been charged more than the reasonable value of the services rendered, your verdict should be for the plaintiff in the amount that he has been overcharged.

The plaintiff has a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or reduce damages.

The defendants have the burden of proving by a preponderance of the evidence:

1. that the plaintiff failed to use reasonable efforts to mitigate damages; and

2. the amount by which damages would have been mitigated.

If you find for the plaintiff, you may, but are not required to, award punitive damages. The purposes of punitive damages are not to compensate the plaintiff, but to punish a defendant and to deter a defendant and others from committing similar acts in the future.

The plaintiff has the burden of proving that punitive damages should be awarded, and the amount, by a preponderance of the evidence. You may award punitive damages only if you find that defendant's conduct was malicious, oppressive or in reckless disregard of the plaintiff's rights. Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring another. Conduct is in reckless disregard of the plaintiff's rights if, under the circumstances, it reflects complete indifference to the plaintiff's safety and rights, or the defendant acts in the face of a perceived risk that its actions will violate the plaintiff's rights under federal law. An act or omission is oppressive if the person who performs it injures or damages or otherwise violates the rights of the plaintiff with unnecessary harshness or severity, such as by the misuse or abuse of authority or power or by the taking advantage of some weakness or disability or misfortune of the plaintiff.

If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering punitive damages, you may consider the degree of reprehensibility of the defendant's conduct and the relationship of any award of punitive damages to any actual harm inflicted on the plaintiff.

You may impose punitive damages against one of the defendants and not the other, and may award different amounts against different defendants.

When you begin your deliberations, you should elect one member of the jury as your presiding juror. That person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. Do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

Some of you have taken notes during the trial. Whether or not you took notes, you should rely on your own memory of what was said. Notes are only to assist your memory. You should not be overly influenced by the notes.

If it becomes necessary during your deliberations to communicate with me, you may send a note through Ms. Scott, signed by your presiding juror or by one or more members of the jury. No member of the jury should ever attempt to communicate with me except by a signed writing; and I will communicate with any member of the jury on anything concerning the case only in writing, or here in open court. If you send out a question, I will consult with the parties before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone—including me—how the jury stands, numerically or otherwise, until after you have reached a unanimous verdict or have been discharged. Do not disclose any vote count in any note to the court.

Verdict forms have been prepared for you. After you have reached unanimous agreement on a verdict, your presiding juror will fill in the forms as appropriate, sign and date them as appropriate, and advise the court that you are ready to return to the courtroom.